SUPREME COURT, U.S.
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No. 90-907

In the Supreme Court of the United States

OCTOBER TERM, 1990

GAETANO VASTOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in remanding this case to the district court for that court to determine whether (1) the government should be permitted to proffer an explanation for its delay in sealing the tape recordings of electronically intercepted conversations; (2) if so, whether that explanation is satisfactory; and (3) if not, whether the admission of that evidence at trial was harmless error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) on remand from this Court is reported at 915 F.2d 865. The original opinion of the court of appeals affirming the denial of petitioner's motion to suppress electronic surveillance tapes (89-1575 Pet. App. 1-75) is reported at 899 F.2d 211.[1] The pretrial opinion of the district court denying petitioner's motion to suppress (89-1575 Pet. App. 76-167) is reported at 670 F. Supp. 1244.

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[1] 89-1575 Pet. App. refers to petitioner's first petition for a writ of certiorari in this case.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1990. The petition for a writ of certiorari was filed on December 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was charged in a 26-count indictment returned by a federal grand jury sitting in the District of New Jersey. The indictment charged him with operating a RICO enterprise through the commission of various crimes, including extortion, schemes to defraud suppliers of businesses controlled by the enterprise, and insurance and bankruptcy fraud.

Petitioner's Video Warehouse in West Long Branch, New Jersey, was the headquarters for the enterprise. The government was authorized to conduct electronic surveillance at the warehouse from March 15, 1985, until June 13, 1985. Although Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518(8)(a), requires immediate sealing of recordings of intercepted conversations "upon the expiration of the [intercept] order," the tapes generated from the surveillance of petitioner's warehouse were not sealed until July 15, 1985. Pet. App. 4-5.

The district court denied petitioner's motion to suppress the tape recordings because of the delay in sealing. Relying on *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975), the court held that suppression was not required as long as the integrity of the tape recordings was established. Because the district court found that the integrity of the tapes had not been questioned, the court did not require the government to explain the reason for the sealing delay. 670 F. Supp. 1244, 1282.

Petitioner was subsequently convicted of two substantive offenses under the Racketeer Influenced and Corrupt Organizations Act (RICO) (Counts 1 and 2), in violation of 18 U.S.C. 1962(c); a RICO conspiracy offense (Count 3), in violation of 18 U.S.C. 1962(d); conspiracy to use extortionate means to collect an extension of credit (Count 4), in violation of 18 U.S.C. 894; and conspiracy to obstruct commerce by means of extortion (Count 9), in violation of 18 U.S.C. 1951. The district court granted petitioner's post-conviction motion for a judgment of acquittal on the Count 1 RICO offense. Petitioner was sentenced to a total of 20 years' imprisonment and a $70,000 fine.

2. The court of appeals reinstated the Count 1 RICO conviction, reversed petitioner's conviction on the Count 2 RICO offense, and affirmed the other convictions.[2] With respect to the issue involving the delay in sealing the tapes, the court of appeals affirmed the district court's ruling admitting the tapes. In accordance with *Falcone*, the court of appeals found that suppression of the tapes was unwarranted where petitioner had not "challenged the district court's finding that the tapes had not been altered." 899 F.2d 211, 238 n. 33.

3. Thereafter, in *United States* v. *Ojeda Rios*, 110 S. Ct. 1845 (1990), this Court rejected the government's argument, and the position adopted by the Third Circuit in *Falcone*, that electronic surveillance tapes are admissible if the government can establish their integrity despite delays in sealing. The Court construed 18 U.S.C. 2518(8)(a) to require suppression in the absence of a "satisfactory explanation" for the delay, even where the tapes are pristine. In *Ojeda Rios*, the Court agreed that the government had proffered a satisfactory explanation for the delay in its brief

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[2] The court of appeals remanded the case for resentencing and entry of a corrected judgment.

to this Court, but in response to Ojeda's allegation that the government had proffered a different explanation at the suppression hearing, the Court "remanded for a determination whether the Government's explanation to the District Court substantially corresponds to the explanation it now advances." 110 S.Ct. at 1851. In a concurring opinion, Justice O'Connor agreed that the satisfactory explanation must be based on "findings made and evidence presented in the district court, rather than on a *post hoc* explanation given for the first time on appeal." *Id.* at 1852. She therefore concurred in the remand for a determination of whether the explanation tendered by the government in the district court was satisfactory. *Ibid.*

Following its decision in *Ojeda Rios*, the Court granted certiorari in the instant case, vacated the judgment below, and remanded for further consideration. *Vastola* v. *United States*, 110 S.Ct. 3233 (1990).

4. On remand, the court of appeals remanded the case to the district court for further proceedings. The court observed that the government may not have offered an explanation for the delay at the original suppression hearing because it acted "in reasonable reliance on *Falcone*, [and] assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point." Pet. App. 27. The court remanded to the district court for a determination of whether, by failing to proffer an explanation at the pretrial suppression hearing, the government had waived its right to proffer one now. Should the district court conclude that the government did not waive its right to offer an explanation, the court of appeals directed the district court to determine whether the government has a satisfactory explanation for the sealing delay. The court of appeals further noted that if the district court finds on remand that the Video Warehouse tapes should have been suppressed,

the district court may have to decide whether the introduction of those tapes at trial was harmless error. *Id.* at 28-31.

On December 14, 1990, the district court conducted a hearing on the questions whether the government waived its right to present a satisfactory explanation and whether the government could satisfactorily explain the delay. The court has not yet ruled on those issues.

ARGUMENT

Petitioner contends that the government may not now offer an explanation for the delay in sealing the Video Warehouse tapes. For that reason, he claims, the court of appeals committed error when it remanded the case to the district court for a determination whether the government had waived its right to proffer an explanation.

1. Petitioner's position before this Court, in essence, is that because the government did not offer an explanation for the delay in sealing the wiretap evidence at the initial suppression hearing before trial, it may not do so now. The court of appeals, however, did not reject that contention. Instead, it simply remanded the case to the district court to rule on that claim as well as any other issues that may be presented by petitioner's motion to suppress the wiretap evidence, including whether the government's explanation is "satisfactory," and whether, if it is not, the admission of the evidence was nonetheless harmless error. Because neither the court of appeals nor the district court has ruled on petitioner's claim, that claim is not ripe for review by this Court.

The district court may agree with petitioner that by failing to explain the delay prior to trial, the government is now foreclosed from doing so. Or the district court may find that the government does not have a satisfactory explana-

tion for the delay. Should the district court accept petitioner's argument on either point, it will be required under *Ojeda Rios* to suppress the tapes. In that event, there will be no need for this Court to review the claim that petitioner is now raising. Should the district court reject petitioner's arguments and rule that the tapes were properly admitted, petitioner can appeal that ruling to the court of appeals. Should he obtain no relief in that court, he will be free to advance his waiver argument and to attack the adequacy of the government's explanation in a petition to this Court.

In view of the fact that the court of appeals has not decided any substantive issue in this case, the only question presented at this juncture is whether the court of appeals committed error when it remanded the case to the district court to permit that court to make an initial determination of the legal issues that petitioner raises in support of his motion to suppress. The question whether to permit a district court to address a legal issue in the first instance, and to hold any evidentiary hearing that may be necessary to the disposition of that issue, is a question committed to the judgment of the court of appeals, see 28 U.S.C. 2106. Accordingly, the question whether it was appropriate for the court of appeals to remand this case for initial consideration by the district court is a narrow and fact-bound inquiry in an area in which the courts of appeals enjoy broad discretion. It is therefore not an issue that even remotely warrants this Court's attention.

2. In any event, petitioner is wrong in contending that, under this Court's decision in *Ojeda Rios*, the government may not now be permitted to provide an explanation for the delay in sealing. In the district court, the government did not provide an explanation for the delay, but instead relied on the Third Circuit's decision in *United States* v. *Falcone*, 505 F.2d 478 (1974), which held that evidence could not be suppressed under 18 U.S.C. 2518(8)(a) because of

a delay in sealing if "the integrity of the tapes is pure." 505 F.2d at 484. Although petitioner argues (Pet. 17-18) that under *Falcone* the government could not properly rely on the integrity of the tapes to defeat a motion to suppress evidence, there is nothing in *Falcone* that supports that argument. The court in *Falcone* stated that the prompt sealing requirement was important and should be complied with. But it then held that a delay in sealing, regardless of the sufficiency of the explanation, was not a ground for suppression as long as the tapes had not been tampered with. In light of that holding, it was perfectly reasonable for the government to litigate the motion to suppress by proving that the tapes were unaffected, and not to litigate the question whether the explanation for the delay was satisfactory.

In light of the government's reasonable reliance on *Falcone*, the government cannot be said to have forfeited its right to demonstrate a satisfactory explanation for the sealing delay once this Court decided *Ojeda Rios* and effectively overruled *Falcone*. The Court in *Ojeda Rios* held that the government could not on appeal proffer an explanation for its sealing delay that was different from the explanation it gave in the district court. For that reason, the Court remanded the *Ojeda Rios* case for a determination whether the explanation given on appeal accorded with the explanation given in the district court.[3] This case, however, does not present a claim of inconsistency in the government's position; here, unlike in *Ojeda Rios*, the government has not previously given an explanation of the sealing delay, because, unlike in *Ojeda Rios*, no such explanation was necessary in order for the government to prevail in the

[3] On remand from this Court's judgment, the district court in *Ojeda Rios* held that the explanation in the district court was the same as that given on appeal and in this Court. *United States* v. *Gerena*, Crim. No. H-85-50 (TEC), ruling on remand from the Second Circuit Court of Appeals (D. Conn. Oct. 10, 1990).

district court and the court of appeals. Once this Court declared the law to be contrary to what the district court and the court of appeals had held it to be, it is entirely reasonable to give the government an opportunity to satisfy what this Court has now declared the government's evidentiary obligations to be.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner's reliance on this Court's decision in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), is misplaced. In that case, the Court observed that the burden of establishing a violation of a particular party's Fourth Amendment rights is on the party seeking to suppress evidence, and that the defendants had failed to satisfy that burden by claiming an ownership interest in the property that was seized. In that case, each court that had addressed the defendants' claim had rejected it. That case therefore involved a losing party's failure to raise an issue essential to establishing his claim, rather than a prevailing party's reliance on one of several possible grounds on which it could prevail, followed by an appellate court's rejection of that ground, as in this case.

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